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Supreme Court, U. S.
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No. 73-751

In the Supreme Court of the United States

October Term, 1973

PALM BEACH NEWSPAPERS, INC.,
a Florida corporation,
GREGORY E. FAVRE, R. H.
KIRKPATRICK, TOM SAWYER and
JANE ARPE,
Petitioners,
v.
LLOYD F. EARLY,
Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT BROWARD COUNTY, STATE OF FLORIDA

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INDEX

Page

Statement.....1

Certiorari Properly Runs Directly to the Florida Trial Court.....2

The Trial Court's Orders Are Reviewable by the United States Supreme Court.....4

The State Court Based its Orders Upon Insubstantial State Grounds and Ignored Petitioners' Federal Rights.....4

The Mere Claim of Punitive Damages Should Not Give Respondent the Right to Confidential Financial Information.....9

The Threat of a Punitive Damage Award to a "Public Official" or "Public Figure" Constitutes a Serious Infringement on First Amendment Rights.....9

Conclusion.....12

Certificate of Service.....P-5

APPENDICES

"N"--Order Quashing Petition for Writ of Certiorari by Fourth District Court of Appeal.....N-1

"O"--Motion to Strike in Circuit Court.....O1-2

"P"--Complaint.....P1-4

CITATIONS

Page

Cases:

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux (1929) 49 S.Ct. 485 7

Carondelet Canal & Navigation Co. v. Louisiana (1914) 233 U.S. 362.....4

Chicago & E.I.R. v. Industrial Commission of Illinois (1932) 52 S. Ct. 151 3

Federal Savings & Loan Ins. Corp. v. Krueger (U.S.D.C. v. Ill. July 12, 1972) 41 U.S.L.W. 2040 9

Rosenbloom v. Metromedia (1971) 403 U.S. 29.....5,10,11

Tallahassee Democrat, Inc. v. Pogue (1973) 280 So.2d 512 6,9

Michigan-Wisconsin Pipe Line Co. v. Calvert (1954) 347 U.S. 157.....3

New York Times v. Sullivan (1964) 376 U.S. 254.....5,10

Thompson v. City of Louisville (1960) 362 U.S. 199.....3

Virginia Rz. Co. v. Mullens (1926) 271 U.S. 220 3

West Chicago Street R. Co.
v. Illinois ex rel. Chicago
(1906) 26 S.Ct. 518.....8

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PETITIONERS' SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTEENTH JUDICIAL CIRCUIT COURT BROWARD COUNTY, STATE OF FLORIDA

STATEMENT

Petitioners filed their Petition for Certiorari on November 9, 1973, to review two orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida. The decisions denied Petitioner newspaper its Constitutional rights.

Respondent has filed a Brief in Opposition first raising certain questions as to jurisdiction. Petitioners feel constrained to file this brief as permitted by Supreme Court Rules 24.4 and 24.5.

CERTIORARI PROPERLY RUNS DIRECTLY TO THE FLORIDA TRIAL COURT

Petitioners will not comment on Respondent's Statement of the Case except to urge that the certain factual matters Respondent indicates should be brought to light are not significant nor are these facts a revelation of matters not covered in Petitioners' Statement of the Case. It is a misstatement, however, on page 3 of Respondent's Statement of the Case to claim an abandonment of Petitioners' motion to strike the claim for punitive damages. It should be noted that the petition and brief before the Florida Supreme Court were designed primarily to gain acceptance by the Florida Supreme Court of Petitioners' petition for writ of certiorari. There can be no doubt that Petitioners sought review of both of the circuit court orders of the Seventeenth Judicial Circuit. Actually, neither the District Court of Appeal, Fourth District, State of Florida, nor the Supreme Court of Florida actually considered the case on the merits. The District Court of Appeal, Fourth District, State of Florida, refused to accept certiorari. In fact, the Fourth District granted Respondent's motion to quash (Appendix "N") and on reconsideration of its order granting the motion to quash, entered its March 16, 1973, opinion (Appendix "G", Petition), refused to accept Petitioners' petition for writ of certiorari, and merely stated that the matter could be reviewed on appeal after trial.

Petitioners will continue to rely on *Interstate Circuit, Inc. v. City of Dallas, Michigan-Wisconsin Pipe Line Co. v. Calvert, American Railway Express Co. v. Levee, and Stern & Gressman,* Supreme Court Practice (page 3, Petition).

It is submitted that the Respondent is confused when he states that this Petition should not run to the trial court. While it is true that the State court decision to be reviewable must be that of the highest court of the State in which a decision could be had, this, by no means, restricts review to decisions of the highest State court; and, of course, a trial court decision is reviewable in the United States Supreme Court. In a notable recent case of this Court, certiorari was granted to review a decision of the police court of Louisville, Kentucky *(Thompson v. City of Louisville,* 1960, 362 U.S. 199). In the instant case, Petitioners sought review by certiorari in the District Court of Appeal, Fourth District, State of Florida, because such discretionary review was available and in order to exhaust its State court remedy, it was essential that such review be sought.

The review sought by Petitioners was refused by both the District Court of Appeal, Fourth District and the Supreme Court of Florida. Therefore, it is the orders of the trial court that must be taken to the United States Supreme Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954) 347 U.S. 157. See also *Virginia Ry. Co. v. Mullens* (1926) 271 U.S. 220 and *Chicago & E.I.R. v. Industrial Commission of Illinois* (1932) 52 S.Ct. 151. These cases stand for the proposition that certiorari to the State trial court is proper after the State appellate courts decline to review a judgment.

THE TRIAL COURT'S ORDERS ARE REVIEWABLE BY THE UNITED STATES SUPREME COURT

Respondent seeks to persuade this Court not to accept jurisdiction with the argument that the orders involved herein are not "final". It should be noted that the decisions of this Court and, of course, since 1963, the requirement of *finality* for review of State court decisions has been relaxed. While it is certain that the decisions of this Court show a general aversion to piecemeal review, this Court must decide for itself whether the decisions of the State court are final. The effect of the decisions of the trial court are to force from Petitioner newspaper its Federal tax returns for the years 1969, 1970 and 1971, its detailed balance sheet or statement of net worth for the periods of 1969, 1970 and 1971, its profit and loss statements for 1969, 1970 and 1971. The orders complained of threaten serious injury if they are not reviewed, and as a practical matter, will not be reviewable on appeal from a final judgment following the trial *(Carondelet Canal & Navigation Co. v. Louisiana,* 1914, 233 U.S. 362). The trial court's refusal to strike the claim for punitive damages and the granting of Respondent's motion to produce are the final word of a final court, thus reviewable.

THE STATE COURT BASED ITS ORDERS UPON INSUBSTANTIAL STATE GROUNDS AND IGNORED PETITIONERS' FEDERAL RIGHTS

The Respondent appears to place great emphasis upon that portion of the Fourth District Court of Appeal order which stated that the Petitioners could appeal after the trial and after a jury verdict. Obviously, an appeal at that stage of the proceeding would be a use-

less act if the Respondent already had gained the tax returns, profit and loss statements, etc., and presumably by that time used the confidential information during the trial of the case. This Honorable Court has always been diligent in its efforts to protect First Amendment rights. Respondent certainly cannot seriously argue that this case does not involve a "federal question". In addition to the United States Constitutional provisions involved, Federal Statutes are involved. (26 U.S.C. Sec. 6103 and Sec. 7213 (a), Appendices "L" and "M", Petition).

The Petitioner newspaper, from the very outset of its attempt to resist the production of the privileged financial information has raised a "substantial" Federal question. The question is neither devoid of merit nor is it frivolous. The Federal question has been raised at every step in the proceeding in the State courts, and examination of the State court order dated August 8, 1972, wherein the court compelled broad discovery and the production of documents, shows clearly that the state grounds advanced for the decision are *insubstantial.* The order is predicated upon divorce cases and decisions clearly distinguishable from the case at bar, since this is a libel case involving the First Amendment and the *New York Times v. Sullivan* (1964) 376 U.S. 254, decision. Also, Petitioners' Motion to Strike dated August 7, 1972 (Appendix "O") and the State court's order dated August 28 denying Petitioners' motion to strike Respondent's claim for punitive damages, although not stated directly in the order, were based on the *New York Times v. Sullivan* case and its progeny, and particulary is the *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, decision applicable.

It is also interesting to note in opposition to Respondent's assertion that the trial court order was based upon adequate State law that scarcely one week subsequent to the rendition by the Supreme Court of Florida of the order denying this Petitioners' petition for writ of certiorari and granting Respondent's motion to dismiss Petitioners' appeal, the District Court of Appeal, First District, State of Florida, on July 17, 1973, in *Tallahassee Democrat, Inc. v. Pogue,* 280 So.2d 512, granted petition for writ of certiorari and quashed an almost identical order of the circuit court of Leon County, Florida, wherein the trial court ordered the petitioner newspaper to produce for use by respondent the petitioner's 1971 and 1972 Federal income tax returns and its most recent profit and loss statements. The court stated as follows:

> "We think the law is well-settled in this case by the case of Spencer Ladd's, Inc. v. Lehman, et al., as found in 167 So.2d 731, from this Court, and affirmed by the Supreme Court of Florida in 182 So.2d 402, wherein the rule was laid down that evidence is permissible to allow the introduction of evidence of "financial worth" of the defendant, in cases where punitive damages are allowable.Financial worth is not synonymous to income tax returns or profit and loss statements. The purpose of punitive damages is for punishment or example as deterrent to others inclined to commit similar wrongs. The purpose of the rule of evidence is to indicate to the jury what amount, if any, a verdict would be proper to assess for punishment and at the same time not render the defendant bankrupt. *The income tax return and profit and loss statements*

would not necessarily portray a true picture of financial worth. A financial statement properly authenticated would be proper for the purpose of financial worth." (Emphasis supplied.)

Of course, Respondent was furnished sworn answers to interrogatories relating to financial circumstances and a sworn statement by its Treasurer (page 6, Petition).

In an early decision of the United States Supreme Court in the case of *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux* (1929) 49 S.Ct. 485, the Court recognized its jurisdiction on petition for writ of certiorari to inquire into whether a Federal right was denied in direct terms, but also whether or not it was denied in substance.

Mr. Justice Van Devanter delivered the opinion of the court, and on page 488 stated:

> "In the state appellate courts, the negro order relied on the Act of Congress of May 5, 1870, and its incorporation thereunder, just as it had done in the trial court, and also insisted that the decree against it was not in accord with the decision of this court in Creswill v. Knights of Pythias, 225 U.S. 246, 32 S.Ct. 822, 56 L.Ed. 1074, where like privileges asserted under that act of Congress by a fraternal and benevolent association incorporated thereunder were involved.
>
> The right thus specially set up in the state court is a federal right. Whether it was denied or

not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire, not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

The Court's attention is also directed to *West Chicago Street R. Co. v. Illinois ex rel. Chicago,* (1906) 26 S.Ct. 518, where it was stated on page 521:

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation, -- although the opinion of the state court does not expressly refer to the Constitution of the United States, -- the judgment rejects the claims of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its nec-

essary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in Chicago, B. & Q.R. Co. v. People (recently decided) 200 U.S. 561, 50 L.ed. --, 26 Sup.Ct.Rep. 341."

THE MERE CLAIM OF PUNITIVE DAMAGES SHOULD NOT GIVE RESPONDENT THE RIGHT TO CONFIDENTIAL FINANCIAL INFORMATION

In this regard, this Court's attention is directed to the Petition previously filed and more particularly to *Federal Savings & Loan Ins. Corp. v. Krueger* (U.S.D.C. N.Ill. July 12, 1972) 41 U.S.L.W. 2040, a Federal court decision which is entirely applicable in this instance. The decision stands for the proposition quoted on page 16 of the Petition. This decision is certainly in keeping with the Federal Statutes previously cited, supra. It is also erroneous for the Respondent to assert that it is well-established in Florida jurisprudence that tax returns and profit and loss statements are discoverable. In fact, the *Tallahassee Democrat, Inc.* case rendered July 17, 1973, supra, holds contra.

THE THREAT OF A PUNITIVE DAMAGE AWARD TO A "PUBLIC OFFICIAL" OR "PUBLIC FIGURE" CONSTITUTES A SERIOUS INFRINGEMENT ON FIRST AMENDMENT RIGHTS

A free and vigorous press cannot be assured in this country if a publisher can be subjected to enormous and unpredictable fines if its publications are violative of

the principles set forth in *New York Times v. Sullivan*, supra, and subsequent cases of this Court.

In the present case, the respondent, Lloyd F. Early, County School Superintendent, is claiming "punitive" damages in addition to actual damages. He is seeking punitive damages in excess of $2,000,000.00 (Appendix "P"). It is submitted that your Petitioners, at the time of publication of the claimed libelous articles concerning Respondent's official competence, could not have foreseen what fine a jury might impose. Petitioners asked the trial court to strike the punitive damage claim (Appendix "O") and confine the Respondent to compensatory or actual damages.

In the *Rosenbloom v. Metromedia* decision of this Court (1971, 403 U.S. 29), Mr. Justice Stewart, in his dissenting opinion, expressed concern about the huge jury award of punitive damages to Mr. Rosenbloom. In the *Rosenbloom* case, the huge sum, as Mr. Justice Stewart expressed it, was not given to compensate him for any injuries but to punish Metromedia.

Of course, in the instant case, the Respondent has not pretended to limit his punitive damage claim to any reasonable amount and, in fact, asks in excess of $2,000,000.00. Justice Stewart also recognized that the manner in which unlimited discretion may be exercised is plainly unpredictable, and fear of the extensive awards that may be given under the doctrine of punitive damages must necessarily produce an impingement on freedom of the press as recognized in *New York Times*.

Justice Stewart, in page 7 of his dissenting opinion, suggests a remedy as follows:

> "The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially, objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries."

This Court is, of course, aware of Mr. Justice Black's concurring opinion in the *Rosenbloom* case. Quoting from Mr. Justice Black's opinion:

> "However, in my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false. As I stated in Curtis Publishing Co. v. Butts, supra, '(I)t is time for this Court to abandon New York Times v. Sullivan and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.' "

Respondent, in the present case, is seeking detailed financial information from Petitioner newspaper in the hope of showing enormous wealth in an effort to obtain windfall damages. Respondent makes no pre-

tense of denying his purpose. He realizes that his actual damage would be nominal. Therefore, he is concentrating his efforts on showing to the jury wealth sufficient to support a large fine.

Surely the First Amendment to the United States Constitution is intended to protect a newspaper defendant in this instance.

CONCLUSION

For the reasons set forth hereinabove and in the Petition for Writ of Certiorari, the Petition should be granted. Petitioners respectfully urge this Court to reverse the orders of the Seventeenth Judicial Circuit Court, Broward County, State of Florida, concurrently with its issuing the Writ of Certiorari.

Respectfully submitted,

JOHN F. LAW, JR.
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P. O. Box 14577
North Palm Beach, Florida
33408

Attorneys for Petitioners

APPENDIX "N"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1972
Case No. 72-859

PALM BEACH NEWSPAPERS, INC.,
etc., et al.
Petitioners,
v.
LLOYD F. EARLY,
Respondent,

OCTOBER 10, 1972.

ORDERED that Respondents' motion filed September 11, 1972 to quash petition for writ of certiorari is granted, but without prejudice to raise the same point on appeal.

A TRUE COPY
(COURT SEAL)
/s/EMMETT J. COMISKEY
CLERK
cc:
Ryan, Taylor & Law
Heuer & Albury
Farish & Farish

APPENDIX "O"

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY
CIVIL ACTION
Case No. 71-10447 -- Richardson

LLOYD F. EARLY,
Plaintiff,
vs.
PALM BEACH NEWSPAPERS,
INC., etc., et al.,
Defendants.

MOTION TO STRIKE

COME NOW the Defendants, by and through their undersigned attorneys, and move to strike Plaintiff's claim for punitive damages, and for grounds therefore would show:

1. That since the Supreme Court ruling in *New York Times v. Sullivan* and subsequent decisions of the Supreme Court, which have been followed by decisions of the Florida Appellate Courts involving libel actions filed by "public officials" or "public figures", the Supreme Court of the United States has defined malice in such a manner as to make the willfulness or ill will immaterial.

2. That punitive damages in "public official" or "public figure" cases have been abolished by said decisions of the United States Supreme Court.

WHEREFORE, Defendants pray that the punitive

damage claim contained in Plaintiff's Complaint be stricken.

I HEREBY CERTIFY that a copy of the foregoing has been furnished FARISH & FARISH, Attorneys for Plaintiff, 316 First Street, West Palm Beach, Florida, 33401, by hand, this 7th day of August 1972.

RYAN, TAYLOR, BOOKER & LAW
Attorneys for Defendants
P. O. Box 14577
North Palm Beach, Florida, 33408 and
HEUER AND ALBURY
Attorneys for Defendants
Suite 200, Pan-American Building
West Palm Beach, Florida, 33401
By: /s/John F. Law, Jr.
Of Counsel

APPENDIX "P"

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.
CIVIL ACTION
NO. 70 C 3600-- Hewitt

LLOYD F. EARLY,
Plaintiff,
vs.
PALM BEACH NEWSPAPERS,
INC., a Florida corporation,
et al.,
Defendants.

COMPLAINT

NOW COMES the Plaintiff, LLOYD F. EARLY, by and through his undersigned attorneys, and sues the Defendants, PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, and alleges:

1. That the Plaintiff, at all times material herein, is a qualified educator having devoted his life to his profession, and is the duly qualified and elected Superintendent of schools for Palm Beach County, Florida, pursuant to Art. 9, para. 5 of the Constitution of the State of Florida.

2. That the Defendant, PALM BEACH NEWSPAPERS, INC., a Florida corporation, edits, publishes, distributes and sells a daily newspaper under the names of The Palm Beach Post, The Palm Beach Times and The Palm Beach Post-Times, seven days a

week, principally in Palm Beach County, and in other counties in Florida.

3. That the Defendants, FAVRE, KIRKPATRICK, SAWYER and ARPE, are residents of Palm Beach County, Florida, and employees of the Defendant, PALM BEACH NEWSPAPERS, INC., and did on various dates commencing on July 23, 1969, through and including the present time confederate and conspire among themselves and with the Defendant, PALM BEACH NEWSPAPERS, INC., in behalf of the said PALM BEACH NEWSPAPERS, INC., to edit, write, publish and distribute certain articles composed of and concerning the Plaintiff, more specifically described infra herein.

4. That said writings were false, inflammatory, inaccurate, prejudicial, misleading and defamatory language, and that said Defendants caused same to be published knowing of their falsity, or with reckless and other disregard for its truth or falsity or its prejudicial content and effect, and with reckless disregard said publications would have on the reputation and well-being of the Plaintiff.

5. That said publications made by the Defendants, done with the aforesaid malicious and wanton motive, were published and circulated in the Defendant, PALM BEACH NEWSPAPERS, INC.'s publications, and were distributed to all of said Defendant's subscribers and were sold on the newsstands throughout Palm Beach County, Florida, and the immediate adjoining counties.

6. That a copy of said publications is hereby at-

tached hereto and made a part hereof by reference being designated as Exhibits 1 through 108.

7. That the aforesaid false, unprivileged and defamatory publications, referrable to the Plaintiff, imputed conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office, and exposed the Plaintiff to distrust, hatred, ignominy, contempt, ridicule, humiliation and obloquy, and caused and will continue in the future to cause the Plaintiff to be avoided; and has and will in the future have a tendency to injure the Plaintiff in the proper exercise of his lawful occupation, business, employment and profession.

8. That the aforesaid publications and articles were published and distributed with malice toward the Plaintiff, and were calculated to cause and, from their natural and proximate consequence, did cause great injury to the Plaintiff in his personal, social and official business relations; and further, caused and will continue to cause him to suffer great mental and physical pain and anguish. That said damages are both temporary, continuing and permanent.

9. That on or about June 2, 1970, Plaintiff demanded in writing a retraction by the Defendant, PALM BEACH NEWSPAPERS, INC., in compliance with Chapter 770 FSA on said defamatory statements. That following receipt of Plaintiff's said demand for retraction, said Defendant did and continues to fail and refuses to comply with said demand.

WHEREFORE, Plaintiff claims compensatory damages in an amount in excess of ONE MILLION

($1,000,000.00) DOLLARS and punitive damages in an amount in excess of TWO MILLION ($2,000,000.00) DOLLARS from the Defendants, and demands trial by jury.

/s/Jos. D. Farish, Jr.
Of Counsel

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida
833-7766
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, I certify that I have this 8 day of January, 1974, deposited in the United States mail box at North Palm Beach, Florida, with first-class postage prepaid, envelopes containing copies of the foregoing Petitioners' Supplemental Brief and appendices addressed to Hon. Jos. Farrish, Jr., Attorney for Respondent and counsel of record for him, at his office address, 316 First Street, Denco Building, West Palm Beach, Florida, 33401.

John F. Law, Jr.